STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0056

Weston Palmer Harbison, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 6, 2022
Affirmed
Slieter, Judge

Ramsey County District Court
File No. 62-CR-13-2915

Cathryn Middlebrook, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John Choi, Ramsey County Attorney, Jeffrey A. Wald, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Slieter, Presiding Judge; Ross, Judge; and Johnson, Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this appeal from an order denying postconviction relief from a conviction for DWI test refusal, appellant argues that (1) the postconviction court abused its discretion by reconsidering its prior ruling that vacated the conviction, and (2) the state forfeited its

timeliness defense which formed the basis of the postconviction court's order denying postconviction relief. The postconviction court had a compelling reason to reconsider its order because of an intervening legal development, and the state's timeliness defense was not forfeited. Thus, the postconviction court acted within its discretion to deny relief, and we affirm.

FACTS

In 2013, appellant Weston Palmer Harbison pleaded guilty to first-degree driving while impaired (DWI) test refusal, in violation of Minn. Stat. § 169A.20, subd. 2 (2012).[1] Harbison was sentenced to 66 months in prison and five years of conditional release.

In November 2018, Harbison filed a petition for postconviction relief based on *Johnson v. State*, 916 N.W.2d 674 (Minn. 2018). *Johnson* held that the rule prohibiting the state from "criminaliz[ing] refusal of a blood or a urine test absent a search warrant or a showing that a valid exception to the warrant requirement applies" is retroactive and requires "case-by-case determinations to assess whether there was a warrant or an exception to the warrant requirement sufficient to sustain test-refusal convictions." 916 N.W.2d at 679, 684; *see also Birchfield v. North Dakota*, 579 U.S. 438, 476-77 (2016) (holding that blood test-refusal statutes are valid only if law enforcement has a search warrant or a valid exception to the warrant requirement applies); *State v. Trahan*, 886 N.W.2d 216, 221 (Minn. 2016) (applying *Birchfield* and holding that the Fourth Amendment prohibits convictions for refusing a blood test requested by law enforcement

[1] Harbison was previously convicted for first-degree DWI in 2007 and 2009.

absent a search warrant or exigent circumstances); *State v. Thompson*, 886 N.W.2d 224, 234 (Minn. 2016) (applying *Birchfield* and holding that a person cannot be "prosecuted for refusing to submit to an unconstitutional warrantless blood or urine test").

The postconviction court granted Harbison's petition in July 2019, after concluding that the state "ha[d] the burden of proof" to demonstrate an exception to the search-warrant requirement and the state conceded that it could not meet that burden.

The state appealed the postconviction court's order, claiming that the postconviction court erred by placing the burden on the state to prove the presence of an exception to the search-warrant requirement. *See Harbison v. State*, No. A19-1191, 2020 WL 3172804 (Minn. App. June 15, 2020). While that appeal was pending, the supreme court issued its decision in *Fagin v. State*, 933 N.W.2d 774, 779-80 (Minn. 2019), holding that a postconviction petitioner bears the burden of proof in postconviction proceedings. Based upon *Fagin*, our court reversed and remanded, holding that the postconviction court erred by improperly placing the burden of proof on the state, rather than on Harbison, to establish an exception to the search-warrant requirement. *Harbison*, 2020 WL 3172804, at *2.

In April 2021, a second postconviction evidentiary hearing was held. On August 18, 2021, 20 days before the postconviction court issued its order, the supreme court released its decision in *Aili v. State*, 963 N.W.2d 442, 449 (Minn. 2021), in which it concluded that postconviction petitions filed pursuant to *Thompson* and *Trahan* are subject to the two-year time limit prescribed by Minn. Stat. § 590.01, subd. 4(c) (2020), and, thus, must be filed by October 12, 2018, which was two years after the release of those decisions. Because the petitions in *Aili* were filed after October 12, 2018, they were untimely. *Id.* at 445, 449.

On September 7, 2021, and without reference to *Aili*, the postconviction court issued its order granting Harbison's petition and vacating, for a second time, Harbison's conviction. Two days later, the state filed a motion asking the postconviction court to reconsider its order, arguing that the *Aili* decision "overruled" a previous decision and, thus, changed the law with respect to the two-year deadline to file a postconviction petition pursuant to Minn. Stat. § 590.01, subd. 4(c). And, the state argued, because Harbison's petition was filed after the October 12, 2018 deadline described in *Aili*, the petition was untimely.

The postconviction court issued a second order which dismissed the petition for postconviction relief concluding that the petition was "41 days untimely pursuant to Minn. Stat. 590.01, 4(c)." Harbison appeals.

DECISION

"We review a district court's decision on a petition for postconviction relief for an abuse of discretion." *See Andersen v. State*, 940 N.W.2d 172, 177 (Minn. 2020). "A postconviction court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Brown v. State*, 895 N.W.2d 612, 617 (Minn. 2017) (quotation omitted). A postconviction court's legal determinations are reviewed *de novo*, and its factual findings are reviewed for clear error. *Id.*

Postconviction petitions are governed by Minnesota Statutes chapter 590 (2020). The postconviction statute imposes a time limit for filing postconviction petitions and provides that "[n]o petition for postconviction relief may be filed more than two years after the later of: (1) the entry of judgment of conviction or sentence if no direct appeal is filed;

or (2) an appellate court's disposition of petitioner's direct appeal." Minn. Stat. § 590.01, subd. 4(a) This two-year limitation is subject to five exceptions. Minn. Stat. § 590.01, subd. 4(b). If an exception applies, then the petition invoking that exception "must be filed within two years of the date the claim arises." Minn. Stat. § 590.01, subd. 4(c); *Carlton v. State*, 816 N.W.2d 590, 600 (Minn. 2012).

Harbison makes two arguments. First, he argues that the postconviction court abused its discretion by granting the state's motion to reconsider based on an intervening legal development. Second, he argues that because the state failed to raise the defense that his petition was untimely pursuant to Minn. Stat. § 590.01, subd. 4(c) in its answer, or raise the argument "during the nearly three years that the case was pending in the district court," the defense was forfeited. We address each argument.

Motion to Reconsider

"Motions to reconsider are prohibited except by express permission of the court, which will be granted only upon a showing of compelling circumstances." Minn. R. Gen. Pract. 115.11; *see also Madison Equities, Inc. v. Crockarell*, 889 N.W.2d 568, 574 (Minn. 2017) (concluding that motions to reconsider must present "compelling circumstances" in order for the motion to proceed). "Requests to make such a motion . . . shall be made only by letter to the court of no more than two pages in length, a copy of which must be served on all opposing counsel and self-represented litigants." Minn. R. Gen. Prac. 115.11.

"Although the rules of criminal procedure do not specifically authorize motions for reconsideration[,] . . . the district court has the inherent authority to consider such a motion." *State v. Papadakis*, 643 N.W.2d 349, 356-57 (Minn. App. 2002); *see also State*

v. Montjoy, 366 N.W.2d 103, 107 (Minn. 1985); *Sanchez-Diaz v. State*, 758 N.W.2d 843, 848-49 (Minn. 2008). Motions to reconsider "cannot introduce new evidence into the record." *See State v. Allwine*, 963 N.W.2d 178, 190 (Minn. 2021) (emphasis omitted) (citing *Sullivan v. Spot Weld, Inc.*, 560 N.W.2d 712, 715-16 (Minn. App. 1997), *rev. denied* (Minn. Apr. 27, 1997); Minn. R. Gen. Prac. 115.11 1997 advisory comm. cmt.), *cert. denied*, 142 S. Ct. 819 (2022). We review a postconviction court's decision on a motion to reconsider for an abuse of discretion. *Papadakis*, 643 N.W.2d at 356.

In its order dismissing Harbison's petition as untimely, the postconviction court stated:

> The Minnesota Supreme Court decided *Aili* on August 18, 2021, reversing the Minnesota Court of Appeals and holding that the two-year time frame for post-conviction cases pursuant to *Thompson* and *Trahan* ended on October 12, 2018. Respondent filed a motion to reconsider on September 9, 2021, and Petitioner responded on September 16, 2021. Based on the *Aili* rule and Respondent's initial argument regarding time frames, this Court must follow the two-year limit, for cases originating from *Thompson* and *Trahan*, under Minn. Stat. 590.01, subdiv. 4(c), which ended on October 12, 2018.

(Citation omitted.)

It is apparent, therefore, that the postconviction court combined the issue of *whether* to reconsider its first order with its decision on the merits upon reconsideration which resulted in its second order. That is, the district court implicitly concluded that the recent *Aili* decision was a "compelling circumstance" which warranted reconsideration of its order; and, upon applying the *Aili* decision to the merits of the petition, found it untimely. Additionally, although "committee comments are included for convenience and are not

binding on the court," *Vandenheuvel v. Wagner*, 690 N.W.2d 753, 756 (Minn. 2005) (interpreting the Minnesota Rules of Civil Procedure), we note that the advisory comments to rule 115.11 identify "intervening legal developments" as circumstances likely to warrant reconsideration, Minn. R. Gen. Prac. 115.11 1997 advisory comm. cmt. We agree with those comments. Therefore, the postconviction court acted within its discretion to reconsider its first order.

Forfeiture

Generally, the state's failure to assert the defense that a postconviction petition is untimely under the two-year statute of limitations in Minn. Stat. § 590.01, subd. 4(c), is a forfeiture of that defense. *Weitzel v. State*, 883 N.W.2d 553, 557 (Minn. 2016); *see also Carlton*, 816 N.W.2d at 600 ("It is well established . . . that a defendant, by answering to the merits and going to trial without in any manner attempting to avail himself of a statute of limitations, [forfeits] such defense, although it appears on the face of the complaint that the statute has run." (quotation omitted)).

Harbison argues that, because the state at no time raised the timeliness defense pursuant to Minn. Stat. § 590.01, subd. 4(c), it forfeited the defense. The state argues that it did not forfeit the defense because it raised it in its answer to Harbison's initial petition by referencing Minn. Stat. § 590.01, subd. 4(b). The postconviction court agreed. We conclude that the state did not forfeit the timeliness defense because, prior to the supreme court's *Aili* decision, such a defense would have been fruitless, and a fruitless defense cannot form the basis of forfeiture.

The supreme court has held that a claim is not forfeited when "an intervening change in the law . . . excused" the "failure to bring what would have otherwise been a futile argument." *State v. Lindquist*, 869 N.W.2d 863, 867-68 (Minn. 2015); *see also Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 631 (Minn. 2017) ("A claim becomes ripe when there is an intervening change in the law between a party's initial decision not to raise the claim because it would have been futile under then-existing law, and a later decision to raise that claim for the first time.").

In September 2020, our court in *Edwards v. State*, 950 N.W.2d 309, 316 (Minn. App. 2020), *vacated mem.*, (Sept. 21, 2021), held that a postconviction petition filed pursuant to *Birchfield*, *Trahan*, and *Thompson* must be filed within two years of the *Johnson* decision issued in August 2018. Pursuant to the *Edwards* decision, Harbison's November 2018 petition was timely. *Id.* But as previously discussed, the supreme court's subsequent *Aili* decision held that a postconviction petition must have been filed by October 2018. 963 N.W.2d at 449. The postconviction court was bound by the *Edwards* decision prior to the release of *Aili*. *See State v. Chauvin*, 955 N.W.2d 684, 691 (Minn. App. 2021), *rev. denied* (Minn. Mar. 10, 2021) (holding that "by applying this court's precedential opinions in similar cases even though further appellate review is possible or pending, we promote consistency, predictability, and stability in the law, consistent with the principle of stare decisis").

Thus, at the time the postconviction court heard the parties' arguments on the merits, the timeliness defense was unavailable to the state because of the *Edwards* decision. And

for that reason, it would have been fruitless for the state to raise the defense. However, after the *Aili* decision, it became clear that Harbison's petition was untimely.

Therefore, the postconviction court acted within its inherent authority to consider the motion to reconsider, and upon reconsideration, acted within its discretion to dismiss Harbison's postconviction petition as untimely.

Affirmed.